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NO. 81-112

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BARRY DEAN MICHAEL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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August 24, 1981

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The government opposes certiorari in this matter, essentially saying that the decision below, being on an interlocutory appeal (of the government), has no over-all importance and that the case may go away. Petitioner submits that the case is of utmost importance, as outlined in his petition, and that moreover the government's position is basically opposite of what it said in the court below.

A Fifth Circuit rule (Local Rule 16.2) offers two alternative certificates in asking for a rehearing *en banc:* (1) that the decision of the panel is contrary to other

Fifth Circuit or Supreme Court decisions, or, (2) that "based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance." The three lawyers handling the case below certified in applying for rehearing *en banc* that the second situation applied. Petitioner in his initial Brief of Appellee (p. 7) states that "[the Fifth Circuit] will likely have to decide this case *en banc*" (and remember petitioner was appellee at the time).

The government's position in the Fifth Circuit's *en banc* proceeding (Supp. Br. p. 5) was that "we believe that this [*en banc*] Court can reverse the panel decision [on the facts] without having to decide any of the *novel* constitutional questions the case *otherwise* poses" (emphasis supplied). Of course, as we now know, the Fifth Circuit *en banc* court rejected that suggestion and did go into "the novel constitutional questions," coming out with three majority opinions and two minority ones. And then there is the wide variety of opinions on the "novel" questions throughout the federal system.

Clearly this case comes under at least a couple of exceptions regarding certiorari on interlocutory proceedings that are discussed in *Stern and Gressman*, § 4.19 ("some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari;" "a conflict on a question of law with another court of appeals or a highest state court"). It seems to satisfy the reservation expressed by Justice Rehnquist in *Miroyan v. United States*, 439 U.S. 1338 (1978). The Fifth Circuit *en banc* decision is being discussed in the cases throughout the federal system. Totally opposite results are going to be achieved in criminal cases in different parts of the country. One would

think that the Solicitor General would want this area clarified; it seems obvious that the circuits will not be able to resolve the issues.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served three copies of the within and foregoing Petitioner's Response to Memorandum for the United States In Opposition upon the Solicitor General, U.S. Department of Justice, Washington, D. C. 20053; and upon the U.S. Attorney, 75 Spring Street, Atlanta, Georgia 30303, by depositing same in the United States Mail in properly addressed envelopes with adequate postage thereon. I further certify that all parties required to be served have been served.

This the _____ day of August, 1981.

ALBERT M. HORN